

2006 WL 1787244 (N.D.Cal.) (Trial Pleading)
United States District Court, N.D. California.
San Francisco/Oakland Division

Juanita WYNNE and Dante Byrd, on behalf of themselves and classes of those similarly situated, Plaintiffs,
v.
MCCORMICK & SCHMICK'S SEAFOOD RESTAURANTS, INC. and McCormick & Schmick Restaurant Corp.,
Defendants.

No. C 06 3153 CW.
May 11, 2006.

Complaint for Injunctive, Declaratory Relief, and Damages for Violations of 42 U.S.C. § 1981 and the California Fair Employment and Housing Act

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CLASS ACTION

DEMAND FOR JURY TRIAL

Individual and Representative Plaintiffs Juanita Wynne and Dante Byrd (collectively "Representative Plaintiffs"), on behalf of themselves and all others similarly situated, allege against Defendants McCormick & Schmick's Seafood Restaurants, Inc. and McCormick & Schmick Restaurant Corp. (hereinafter collectively identified as "McCormick & Schmick's," "M&S," or "the Company") as follows:

INTRODUCTORY STATEMENT

1. Defendant McCormick & Schmick's is a national restaurant chain that discriminates against African Americans throughout the United States on the basis of race with respect to hiring, job assignment, compensation, promotion to managerial positions, discipline, and other terms and conditions of employment.
2. M&S has a nationwide corporate policy and practice of preferring white employees over African American employees for "front-of-the-house" positions (i.e., prominent positions such as server, hostess/host and bartender where customers can

easily see and/or interact with the employees), and management positions in its restaurants and offices throughout the United States. M&S disproportionately hires white employees for, and assigns white employees to, front-of-the-house positions and disproportionately assigns African American employees to back-of-the-house positions (i.e., positions in which employees are less likely to be seen by, heard by, or interact with customers). Those back-of-the-house positions include busser positions, bar back positions, and certain less desirable kitchen positions. The few African Americans assigned to server positions are given less desirable assignments.

3. M&S discourages applications from African American applicants for “front-of-the-house” positions and disproportionately refuses to hire African Americans for such positions. To the extent that M&S hires African Americans, M&S disproportionately channels them to back-of-the-house positions.

4. When qualified African American applicants (both incumbents and individuals from outside the Company) inquire about employment in the restaurant, managers and other M&S representatives sometimes tell them that the restaurant is not hiring, even though it is. When African American applicants submit applications, managers and other M&S representatives acting at their direction sometimes throw them away without seriously considering them.

5. Furthermore, promotions are often given preferentially to white workers

6. M&S hires, assigns, compensates, and promotes individuals using subjective, arbitrary, standardless, and unvalidated criteria, without requiring a formal application process.

7. In addition, M&S systematically takes adverse employment actions against qualified, high-performing African American employees in front-of-the-house positions by giving them less desirable job assignments, lower pay, fewer promotional opportunities, and more frequent and harsher discipline.

8. Managers have been instructed by corporate headquarters to “clean up the restaurant,” meaning to hire fewer African Americans, to keep the African American employees away from front-of-the-house positions, and to subject African American employees to harsher discipline.

9. This class action is brought by (a) current and former African American non-management employees of M&S throughout the United States; and (b) African Americans who applied to, or were deterred from applying to, M&S at its restaurants or offices in the United States for “front-of-the-house” or management positions, but were not hired.

10. This action seeks an end to M&S’s discriminatory policies or practices, an award of backpay and front pay, as well as compensatory damages, punitive damages, and injunctive relief, including rightful place relief for all Class members.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the First Claim for Relief pursuant to 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1981.

12. This Court also has jurisdiction over the First and Second Claims for Relief under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because this is a class action in which: (1) there are 100 or more individuals in each proposed Class; (2) at least some individuals in each proposed Class have different state citizenship from at least one Defendant; and (3) the claims of the proposed Class members exceed \$5,000,000 in the aggregate.

13. In addition, this Court has supplemental jurisdiction under 28 U.S.C. § 1367 over the Second Claim for Relief, because that claim and Plaintiffs’ First Claim for Relief arise from a common nucleus of operative fact.

14. This Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

15. The Northern District of California has personal jurisdiction over Defendants because they have qualified with the California Secretary of State to do business and are doing business in California, and in this district, and because many of the acts complained of occurred in this State and this District and gave rise to the claims alleged herein.

16. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because M&S resides in this district and because a substantial part of the events giving rise to the claims alleged herein occurred in this District. M&S operates restaurants in San Francisco, Berkeley, and San Jose.

17. Pursuant to N.D. Cal. Local Rule 3-2(c) and (d), intradistrict assignment to the San Francisco / Oakland Division is proper because a substantial part of the events giving rise to the claims presented in this Complaint occurred in Alameda County.

PARTIES

18. Plaintiff Juanita Wynne is an African American resident of Berkeley, California. She has repeatedly been denied desirable shifts and work stations, inappropriately disciplined for insignificant infractions, and had her number of shifts (and pay) cut approximately in half at Spenger's Fresh Fish Grotto restaurant in Berkeley, California, owned and operated by M&S, when similarly situated whites were treated more fairly.

19. Plaintiff Dante Byrd is an African American resident of Oakland, California. He twice applied for and was denied a position as a bartender at Spenger's Fresh Fish Grotto restaurant in Berkeley, California, owned and operated by M&S, despite having a diploma from a bartending school and more than seven years of bartending experience, and even though whites who were not more qualified were hired.

20. Defendant McCormick & Schmick's Seafood Restaurants, Inc. is headquartered in Portland, Oregon and is incorporated in Delaware.

21. Defendant McCormick & Schmick Restaurant Corp. is a subsidiary of McCormick & Schmick's Seafood Restaurants, Inc.

22. McCormick & Schmick's is a nationwide restaurant company that owns and operates approximately 61 upscale casual-dining restaurants. McCormick & Schmick's operates its restaurants under various names, including McCormick & Schmick's Seafood Restaurant, McCormick's Fish House & Bar, M&S Grill, Spenger's Fresh Fish Grotto, The Heathman Restaurant, Jake's Famous Crayfish, and Jake's Grill. Although each restaurant may use different menus, different layouts, and/or different marketing approaches, they all follow the same human resources policies and practices, participate in the same discrimination, and are run by the same corporate management. African American applicants to and employees of each restaurant owned or operated by M&S in the United States, however denominated, are included in the proposed Classes.

CLASS ACTION ALLEGATIONS

23. The Representative Plaintiffs bring this Class Action pursuant to Fed. R. Civ. P. 23(a), (b)(2), and (b)(3) on behalf of the following two Classes:

(a) All African Americans who since May 11, 2002 have been employed by, are employed by, or will in the future be employed by McCormick & Schmick's in non-management positions ("Employee Class"); and

(b) All African Americans who since May 11, 2004 have applied for, or been deterred from applying for, server, host/hostess, bartender, or management positions (including chef/sous chef) with McCormick & Schmick's and were not hired for those positions ("Applicant Class").

24. Plaintiff Wynne is a member of, and seeks to represent, the Employee Class. Plaintiff Byrd is a member of, and seeks to represent, the Applicant Class.

25. The members of each Class identified herein are so numerous that joinder of all members is impracticable. The number of Class members is currently indeterminate, but, on information and belief, is larger than can be addressed through joinder. As of December 2005, McCormick & Schmick's employed approximately 5,401 employees. Each of McCormick & Schmick's roughly 61 restaurants employs very few African American employees in front-of-the-house positions, but each restaurant,

on average, annually receives numerous applications from qualified African Americans who are potential front-of-the-house employees. Furthermore, as a result of McCormick & Schmick's systematic discriminatory hiring and job assignment practices, on information and belief, a significant number of qualified African American applicants have also been deterred from applying for front-of-the-house and management positions. Thus, although the precise number of qualified African American applicants who are not hired and/or who are fired or otherwise discriminated against is currently unknown, it is far greater than can be feasibly addressed through joinder.

26. There are questions of law and fact common to the Classes. Common questions include, among others:

- a. whether McCormick & Schmick's policies or practices result in disparate impact adverse to African American employees and applicants;
- b. whether McCormick & Schmick's discriminatory policies and practices are intentional;
- c. whether McCormick & Schmick's policies or practices violate 42 U.S.C. § 1981;
- d. whether McCormick & Schmick's policy and practice violates FEHA, as to Class Members who have been employed by M&S in, or who reside in, California; and
- e. whether compensatory and punitive damages, injunctive relief, and other equitable remedies (including backpay and front pay) for the Classes are warranted.

27. The Representative Plaintiffs' claims are typical of the Classes' claims.

28. The Representative Plaintiffs will fairly and adequately represent and protect the interests of the members of the Classes. The Representative Plaintiffs have retained counsel competent and experienced in complex class actions and employment discrimination litigation.

29. Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because McCormick & Schmick's has acted and/or refused to act on grounds generally applicable to the Classes, making appropriate declaratory and injunctive relief with respect to the Representative Plaintiffs and the class as a whole. The Class members are entitled to injunctive relief to end McCormick & Schmick's common, uniform, and unfair racially discriminatory employment policies and practices.

30. Class certification is also appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because common questions of fact and law predominate over any questions affecting only individual members of the Class, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation. The Class members have been damaged and are entitled to recovery as a result of McCormick & Schmick's common, uniform, and unfair racially discriminatory employment policies and practices. McCormick & Schmick's has computerized payroll and personnel data that will make calculation of damages for specific Class members relatively simple.

CLAIMS OF THE REPRESENTATIVE PLAINTIFFS

Juanita Wynne

31. Plaintiff Juanita Wynne is an African American resident of Berkeley, California, and current employee of McCormick & Schmick's. She has been employed as a server at Spenger's Fish Grotto in Berkeley, California, since approximately November 1999. During approximately 2002-03, her shifts and pay were cut approximately in half, whereas the shifts and pay of white servers were not so cut. Ms. Wynne has been also denied desirable shifts and stations, and she was disciplined for insignificant infractions, while white employees were not so disciplined.

32. Ms. Wynne is currently the only African American server on staff at the restaurant.

33. Ms. Wynne has observed that McCormick & Schmick's tends to seat African American customers at the back of the restaurant, where they are less visible to the rest of the public.

34. On or about May 3, 2005, Ms. Wynne filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On or about June 30, 2005, she filed an amended charge of discrimination with the EEOC. She received a copy of her Notice of Right to Sue from the California Department of Fair Employment and Housing ("DFEH"), dated April 25, 2005. Attached to this Complaint as Exhibit A and incorporated by reference are copies of those charges and that notice. The EEOC is currently investigating Ms. Wynne's charge and has not issued a Notice of Right to Sue to Ms. Wynne. Plaintiffs intend to seek leave to amend the complaint to add a classwide cause of action under Title VII of the Civil Rights Act of 1964 on behalf of Ms. Wynne once the Notice of Right to Sue is issued, and to propose Ms. Wynne as a Class Representative for the Employee Class for relief under Title VII.

Dante Byrd

35. Plaintiff Dante Byrd is an African American resident of Oakland, California, and applicant to McCormick & Schmick's.

36. In November 2004, Mr. Byrd applied to become a bartender at M&S's Spenger's Fish Grotto in Berkeley. He was interviewed by the General Manager/Bar Manager, a non-African American male. Mr. Byrd thought the interview went well, but he never heard back about the job.

37. In January 2005, Mr. Byrd learned that McCormick & Schmick's was again seeking applications from bartenders, so he applied again. He was interviewed by the same non-African American male and by a white female. He was invited to come back and work the bar for a test shift. He did so, working for approximately 4-5 hours. The General Manager/Bar Manager told Mr. Byrd that he had done a good job on this test shift. Mr. Byrd was never paid for this work. He never heard back about the job.

38. At the time, Mr. Byrd had seven years of experience as bartender, plus a year of attendance and graduation from bartender school. Since being denied employment at McCormick & Schmick's, Mr. Byrd has applied for and been hired by a comparable restaurant in Oakland, California.

39. On or about June 29, 2005, Mr. Byrd filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). He received a copy of his Notice of Right to Sue from the California Department of Fair Employment and Housing ("DFEH"), dated July 6, 2005. Attached to this Complaint as Exhibit B and incorporated by reference are copies of that charge and that notice. The EEOC is currently investigating Mr. Byrd's charge and has not issued a Notice of Right to Sue to Mr. Byrd. Plaintiffs intend to seek leave to amend the complaint to add a classwide cause of action under Title VII of the Civil Rights Act of 1964 on behalf of Mr. Byrd once the Notice of Right to Sue is issued, and to propose Mr. Byrd as a Class Representative for the Applicant Class for relief under Title VII.

GENERAL POLICIES OR PRACTICES OF DISCRIMINATION

40. The denials and abridgments of employment opportunities suffered by the Representative Plaintiffs are part of a general policy or practice of discrimination on the basis of race in employment that has existed at McCormick & Schmick's since at least May 10, 2002. These are not isolated employment practices or individual decisions. On the contrary, these incidents are representative of McCormick & Schmick's systematic discrimination against African Americans and in favor of white applicants and employees, to create an overwhelmingly white image to the public.

41. The under-representation of African Americans in front-of-the-house positions throughout McCormick & Schmick's approximately 61 restaurants in the United States results from a policy and practice of discrimination on the basis of race in hiring, job assignment, compensation, promotion to managerial positions, discipline, and other terms and conditions of employment.

42. McCormick & Schmick's has pursued policies or practices on a continuing basis that have denied or restricted job opportunities to qualified African American applicants and employees.

43. Such discriminatory policies or practices include, without limitation:

- a. reliance on subjective, arbitrary, standardless, and unvalidated criteria in making hiring and job assignment decisions, focusing on whether applicants and employees properly reflect the preferred white look and image rather than whether they would be responsible, effective, diligent employees who could perform their jobs well;
- b. reliance on subjective, arbitrary, standardless, and unvalidated criteria in making decisions in compensation, shift, and weekly hour allocations, focusing on whether applicants and employees properly reflect the preferred white look and image rather than whether they would be responsible, effective, diligent employees who could perform their jobs well;
- c. shunting African American applicants and employees to back-of-the-house positions where they are out of the public eye and/or do not interact with the public;
- d. offering and providing African American employees with fewer hours and/or less desirable job duties and/or assignments than their white counterparts;
- e. targeting white candidates for recruitment for front-of-the-house positions, but avoiding, ignoring, discouraging or dissuading equally qualified African Americans from applying for those positions;
- f. subjecting front-of-the-house African American employees to harsher discipline based on their race without regard to their performance on the job; and
- g. failure to promote African American employees to managerial positions.

44. M&S acted or failed to act as herein alleged with malice or reckless indifference to the protected rights of Plaintiffs and the Class members. Plaintiffs and the Class members are thus entitled to recover punitive damages in an amount to be determined according to proof.

FIRST CLAIM FOR RELIEF

(Federal Civil Rights, 42 U.S.C. § 1981) (Brought by the Representative Plaintiffs on behalf of a nationwide Class)

- 45. Plaintiffs incorporate paragraphs 1 through 43, as alleged above.
- 46. This claim is brought by the Representative Plaintiffs on behalf of themselves and the Classes they represent.
- 47. McCormick & Schmick's has maintained an intentionally discriminatory system with respect to hiring, job assignment, compensation, promotion to managerial positions, discipline, and other terms and conditions of employment.
- 48. The foregoing conduct constitutes illegal intentional discrimination with respect to the making, performance, modification, and termination of contracts prohibited by 42 U.S.C. § 1981.

SECOND CLAIM FOR RELIEF

(California Fair Employment and Housing Act, Government Code § 12940 et seq.) (Brought by the Representative Plaintiffs on behalf of a California subclass)

- 49. Plaintiffs incorporate paragraphs 1 through 43, as alleged above.
- 50. This claim is brought by the Representative Plaintiffs on behalf of themselves and the subclass of Class members who worked for M&S in California, or resided in California, since May 3, 2004.
- 51. The Representative Plaintiffs have received copies of their Right to Sue letters from the DFEH. The pendency of the

EEOC investigations into Plaintiffs' charges tolled the time limits for filing civil actions pursuant to the Fair Employment and Housing Act. Plaintiffs have therefore timely complied with all prerequisites to suit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and Class members pray for relief as follows:

52. Certification of the case as a class action on behalf of the proposed Classes;
53. Designation of the Representative Plaintiffs as representatives of the Classes;
54. Designation of the Representative Plaintiffs' counsel of record as Class counsel;
55. A declaratory judgment that the practices complained of herein are unlawful and violate 42 U.S.C. § 1981 and the California Fair Employment and Housing Act, Government Code § 12940 *et seq.*;
56. A preliminary and permanent injunction against McCormick & Schmick's and its officers, agents, successors, employees, representatives, and any and all persons acting in concert with them, from engaging in each of the unlawful policies, practices, customs, and us ages set forth herein;
57. An order that McCormick & Schmick's institute and carry out policies, practices, and programs that provide equal employment opportunities for all African Americans, and that it eradicate the effects of its past and present unlawful employment practices;
58. An order restoring the Representative Plaintiffs and Class members to their rightful positions at McCormick & Schmick's, or, in lieu of reinstatements, an order for front pay benefits;
59. Back pay (including interest and benefits) for the Representative Plaintiffs and Class members;
60. All damages sustained as a result of McCormick & Schmick's conduct, including damages for emotional distress, humiliation, embarrassment, and anguish, according to proof;
61. Exemplary and punitive damages in an amount commensurate with McCormick & Schmick's ability to pay and to deter future conduct;
62. Costs incurred herein, including reasonable attorneys' fees to the extent allowable by law;
63. Pre-judgment and post-judgment interest, as provided by law; and
64. Such other and further legal and equitable relief as this Court deems necessary, just, and proper.

Dated: May 10, 2006

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Dated: May 10, 2006
Respectfully submitted

By: <<signature>>

James M. Finberg

James M. Finberg (SBN 114850)

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